No. 4533

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# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

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HARTLEY WALKER,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

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## PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

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TORMEY & O'LEARY,
Counsel for Plaintiff in Error.

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## PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

To the Honorable WILLIAM B. GILBERT, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

In applying to the Court for a rehearing and further consideration of the following points urged by us on this appeal, we respectfully submit they were deserving of more consideration than they received.

I.

While the points urged in the Second Count appear in the Assignment of Error in a general way, yet in our opinion it is sufficient to bring

these points before the Court; again our exceptions appear in the Bill of Exceptions.

II.

The Court disposed of Count Two by citing the case of Muncy vs. United States, 189 Federal, 780, and Coats vs. United States, 290 Federal, 134. We have examined these cases carefully and have reached the conclusion that neither case is in point for the following reasons:

In both these cases the information was amended and filed and the plea was entered before the trial.

In this case it is plain to be seen that the Government had concluded its case with the exception of the testimony of officer Hall. Counsel for plaintiff in error did object, (p. 32 of the Record). The Court overruled and the exception was taken.

It is not enough to say in the Opinion that plaintiff in error did not attempt to say that he was taken by surprise or that he did not ask for a continuance or did not suggest or contend that the evidence introduced in support of Count Two was incompetent or irrelevant in respect to the nuisance charge. The general objection of counsel at the time the Second Count was filed, in our opinion, is sufficient, as counsel objected to the filing of a Second Count, at that time. So far as the surprise part of it is concerned it is sufficiently evident. As to asking for continuance, the trial was practically concluded.

It therefore follows that the adding of the Second Count was an abuse of discretion and materially affected the rights of plaintiff in error. There was no officer other than Officer Hall testified for the Government as to Count Two and Hall testified that he did not see the stills until he had entered the premises of the plaintiff in error by virtue of a search-warrant. (Testimony of Officer Hall, p. 40 of the Transcript.)

ASSIGNMENT No. 11.

The Court considered this assignment from the point of view that the Motion to Suppress Evidence was based upon copies of papers and documents set forth in the Assignment, and that the Bill of Exceptions contains neither Motion to Suppress nor affidavit upon which a search-warrant was issued, nor a search-warrant, and fails to show that there was a motion for directed verdict at the close of the evidence, and concluded with the thought that the questions sought to be presented are not properly before the Court for consideration, citing the case of Feigin vs. U. S., 279 Federal, 107. We contend, however, that the questions sought to be urged are properly presented for the consideration of the Court for the following reasons: The Motion to Suppress Evidence was duly and timely filed, supported by the affidavit of plaintiff in error, and attached thereto was a copy of the search-warrant. The motion came on for hearing regularly and the Government failed to file counter-affidavit denying that the documents on file were anything other than

true copies of the search-warrant issued by U. S. Commissioner Palmer in Napa. Feigin vs. U. S. is far from being a case in point. The Bill of Exceptions does show and does refer to a motion to Suppress Evidence (p. 28). The manner in which the Motion to Suppress and also the search-warrant were presented for consideration, in our opinion, does not go to the merits of the case. There is no question but what a search-warrant was issued. Every officer testified that they were operating by virtue of a search-warrant; there is no question that a Motion to Suppress Evidence was duly before the Court in accordance with the rules of the Court and is plainly shown by the Record (p. 9), and said motion was denied.

The Government failed to file a counter-affidavit and also failed to deny that the copy of the search-warrant was other than a true copy.

The Court finds that even though the documents above mentioned and the Motion to Suppress Evidence did appear properly before the Court, that the Defendant could find no advantage, citing the cases of Jerske vs. United States, 1 F. (2), 620; Forni vs. United States, 3 F. (27), 354. These cases, after careful study by us, were found to be far from the point. The gist of these cases is: "That where a crime was flagrantly committed in the presence of officers a search-warrant is unnecessary." But in this case the facts are entirely opposite for the following reasons: each officer testified that he entered the premises by virtue of a search-warrant and

that they could not and did not see any violation before they had entered the premises (Testimony of Officer Hall, p. 40). The search-warrant was procured upon the sworn affidavit of one Chris L. Murr, who stated that it was absolutely necessary to procure a search-warrant in order to search the premises in question. Officer Murr, as the Court well knows, had long been in the employ of the United States Government and was advised and trained in the performance of his duties. He was in charge of the raiding squad and his testimony is absolutely to the effect that he could not see nor was it possible to see nor was it possible to seize or search the premises of Harley Walker without a search-warrant (p. 28). It was upon his affidavit that the search-warrant was procured. It was also Mr. Murr who had charge of the raiding squad, and he testified that he entered the premises of Hartley Walker by virtue of the search-warrant and after he was upon the premises discovered the evidence. It is our firm belief that this Court has time and time again rendered opinions with reference to the requirements necessary for a lawful search-warrant.

We respectfully submit that further consideration of the Second Point we urged will bear out our contention: "That there is not sufficient evidence to warrant a conviction on Count Two; and that the search was unlawful."

We submit also that in our opinion the filing of Count Two in the manner and at the time as

done materially affected the rights of the defendant.

We respectfully submit that the points urged here are entitled to further consideration and therefore ask that a rehearing in this case be granted.

Dated, San Francisco, August 26, 1925.

Respectfully submitted,
TORMEY & O'LEARY,
Attorneys for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for plaintiff in error in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in the fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, August 26, 1925.

TORMEY & O'LEARY,
Counsel for Plaintiff in Error.